

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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THE HIPSAVER COMPANY, INC., )  
Plaintiff, ) Civil Action No. 05-10917 PBS  
v. )  
J.T. POSEY COMPANY, )  
Defendant. )  
AND RELATED COUNTERCLAIM. )  
\_\_\_\_\_  
)

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**DECLARATION OF DOUGLAS H. MORSEBURG IN  
OPPOSITION TO THE MOTION OF THE HIPSAVER COMPANY, INC.  
FOR EXTENSION OF EXPERT DISCOVERY COMPLETION DEADLINE**

I, Douglas H. Morseburg, declare:

1. I am an attorney at law duly licensed to practice before all of the courts of the State of California and I am admitted to practice in this matter pro hac vice. I am an attorney at Sheldon & Mak and am one of the attorneys responsible for representing J.T. Posey Company, Inc. ("Posey") in this matter. I have personal knowledge of the facts set forth below and, if called as a witness and properly sworn, I could and would testify thereto from my own personal knowledge, except as where stated on information and belief and, as to those facts, I believe them to be true. I make this declaration in Opposition to the motion of Plaintiff and Counterclaim Defendant The HipSaver Company, Inc. ("HipSaver") for an extension of the deadline for the completion of expert discovery.

2. On November 29, 2005, HipSaver served Posey with a second request for production of documents (the "Request"). Posey served its written response (the "Response") to the Request on the day it was due, i.e., January 3, 2006. In the Response, Posey objected to the Request on the grounds that, among other things, it was untimely. Posey also interposed substantive objections to the individual document categories described in the Request.

3. On January 16, 2006, HipSaver served Posey with a document entitled "Plaintiff HipSaver's Designation of Expert Witnesses". A true and correct copy of the document is attached as Exhibit "A". At the time HipSaver served its expert designation, it did not serve any expert reports. Nor did it ask the Court to extend its time to serve expert reports.

4. On January 26, 2006, Posey's counsel wrote to HipSaver's counsel a letter, a true and correct copy of which is attached as Exhibit "B".

5. On January 31, 2006, I participated in a telephone conference with counsel for HipSaver regarding HipSaver's failure to produce any expert reports. Afterwards, I wrote a letter to HipSaver's counsel, Edward Dailey. A true and correct copy of my letter is attached as Exhibit "C". I believe that Exhibit "C" correctly summarizes the content of that telephone conference.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed this 24<sup>th</sup> day of March 2006 at Pasadena, California.

/s/ Douglas H. Morseburg  
Douglas H. Morseburg

**EXHIBIT "A"**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

Civil Action No. 05-10917 PBS

The HipSaver Company, Inc.,	)
Plaintiff,	)
	)
v	)
	)
J.T. Posey Company,	)
Defendant	)
	)
<hr/>	
J.T. Posey Company, Inc.,	)
Counterclaim Plaintiff	)
	)
v	)
	)
The HipSaver Company, Inc. and	)
Edward L. Goodwin,	)
Counterclaim Defendants	)
	)
<hr/>	

**PLAINTIFF HIPSAVER'S DESIGNATION OF EXPERT WITNESSES**

Plaintiff, HipSaver, designates the following proposed expert witnesses:

Wilson C. Hayes, Ph.D.  
Corvallis, Oregon

Mechanical engineering, biomechanical engineering, injury biomechanics,  
anatomy, orthopedics, exercise and sports science

Melvin S. Coons, B.S. Chemical Engineering  
Columbus, Ohio  
Chemical engineering

Roy J. Epstein, Ph.D.  
Belmont, Massachusetts  
Marketplace and business damages

THE HIPSAVER COMPANY, INC.  
By its Attorneys,

/s/ Courtney M. Quish  
Lee Carl Bromberg, BBO No.: 058480  
Edward J. Dailey, BBO No.: 112220  
Courtney M. Quish, BBO No.: 662288  
BROMBERG SUNSTEIN LLP  
125 Summer Street - 11th floor  
Boston, Massachusetts 02110-1618  
(617) 443-9292  
(617) 443-0004 (fax)  
cquish@bromsun.com

Dated: January 16, 2006

02820/00502 460097.1

**CERTIFICATE OF SERVICE**

I certify that this document has been filed through the Electronic Case Filing System of the United States District Court for the District of Massachusetts and will be served electronically by the court to the Registered Participants identified in the Notice of Electronic filing.

\_\_\_\_\_  
January 16, 2006

**EXHIBIT "B"**

SHELDON & MAK  
A PROFESSIONAL CORPORATION

## ATTORNEYS

## CORPORATE CENTER

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PASADENA, CALIFORNIA 91101-3021

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SENIOR COUNSELWRITER'S DIRECT NUMBER  
626.356.1217WRITER'S EMAIL  
[DOUG@USIP.COM](mailto:DOUG@USIP.COM)

January 26, 2006

**Via PDF and U.S. Mail**

Edward J. Dailey, Esq.  
 Courtney Quish, Esq.  
 Bromberg Sunstein LLP  
 125 Summer Street  
 Boston, Massachusetts 02110-1618

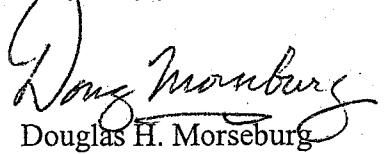
Re: HipSaver v. Posey and Related Counterclaim  
 Sheldon & Mak Matter No. 16112.24

Dear Ed and Courtney:

We have received your expert designations in the above matter, but we have not received any expert reports. We cannot do expert discovery without them. Please let us know when we can expect to receive them. Needless to say, if we do not receive them, we will seek an order excluding expert testimony.

On a related note, in response to Courtney's inquiry, we cannot agree that communications between counsel and testifying experts are privileged. All such communications are subject to discovery.

Very truly yours,



Douglas H. Morseburg

DHM:cs

cc: Jeff Sheldon

**EXHIBIT "C"**

**Doug Morseburg**

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**From:** Doug Morseburg  
**Sent:** Tuesday, January 31, 2006 7:47 PM  
**To:** 'Edward Dailey'  
**Cc:** Cassandra Scardino; Doug Morseburg; Don Piper  
**Subject:** RE: HipSaver v JT Posey - Expert Designations

Dear Ed:

Please let this confirm our telephone conversation of this afternoon during which we discussed expert designations and reports in the above matter.

As I told you, our position is that you were required to provide us with expert designations and expert reports simultaneously. This is consistent with Federal Rule of Civil Procedure 26(a)(2) which provides that, unless the parties stipulate or the Court orders otherwise, a party must simultaneously disclose the identities of its/his/her expert witnesses and produce copies of any expert reports. In this case, the Court has not directed that expert reports be served separately from expert designations and we have not stipulated otherwise, so the provisions of the rule apply.

During our discussion, you contended that a reasonable reading of the Court's scheduling order is that expert designations would be followed by the production of expert reports within a reasonable time afterwards. You also contended that, even if you were required to produce expert reports and your expert designation simultaneously, your experts were unable to produce reports because Posey had not produced various documents.

As for these arguments, I do not think the scheduling order is susceptible of your interpretation. Even if it were, however, the only documents you contend Posey has not produced are financial documents. Surely, you cannot contend that your technical experts needed Posey's financial documents in order to prepare their expert reports. In addition, as I have previously said, since your last request for production was not timely served, Posey's production of financial documents at this point is purely voluntary. (As an aside, Posey's financial documents will be sent to you tomorrow morning via pdf with a copy by U.S. Mail.)

At this point, your expert reports are about two weeks late and there is no way to conduct expert discovery without them. As a consequence, in the event you submit reports for your expert witnesses at a later date, we intend to move to strike them.

Please let me know if you have any questions.

Sincerely,

Doug Morseburg

-----Original Message-----

From: Edward Dailey [mailto:[Edailey@bromsun.com](mailto:Edailey@bromsun.com)]  
Sent: Monday, January 30, 2006 2:13 PM  
To: Doug Morseburg  
Subject: RE: HipSaver v JT Posey

I will call you Tuesday at 2pm (surfer time).  
/Ed

Ed Dailey  
BROMBERG SUNSTEIN LLP  
Winning Intellectual Property  
125 Summer Street

Boston 02110-1618  
617.443.9292  
617.443.0004 (fax)  
617.852.7110 (cell)  
edailey@bromsun.com  
www.bromsun.com

-----Original Message-----

From: Doug Morseburg [mailto:doug@usip.com]  
Sent: Monday, January 30, 2006 4:53 PM  
To: Edward Dailey  
Cc: Cassandra Scardino; Don Piper  
Subject: RE: HipSaver v JT Posey

That would be S.T.

-----Original Message-----

From: Edward Dailey [mailto:Edailey@bromsun.com]  
Sent: Monday, January 30, 2006 12:36 PM  
To: Doug Morseburg  
Cc: Cassandra Scardino; Don Piper  
Subject: RE: HipSaver v JT Posey

2pm Tuesday - eastern time or surfer time?

/Ed

Ed Dailey  
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-----Original Message-----

From: Doug Morseburg [mailto:doug@usip.com]  
Sent: Monday, January 30, 2006 2:30 PM  
To: Edward Dailey  
Cc: Cassandra Scardino; Don Piper; Doug Morseburg  
Subject: RE: HipSaver v JT Posey

Dear Ed:

Re meeting and conferring as to expert discovery, I am not available today, but I am available tomorrow. 2:00 p.m. would be fine.

Sincerely,

Doug

-----Original Message-----

From: Edward Dailey [mailto:Edailey@bromsun.com]  
Sent: Friday, January 27, 2006 1:12 PM  
To: Doug Morseburg; Jeff Sheldon; ajfitzpatrick@duanemorris.com  
Subject: HipSaver v JT Posey

Please see enclosed letter.

/Ed

Ed Dailey  
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-----Original Message-----

From: EDWARD DAILEY [mailto:Edailey@bromsun.com]  
Sent: Friday, January 27, 2006 4:10 PM  
To: Edward Dailey  
Subject: Scanned Document

Please open the attached document. This document was digitally sent to you using the HP 9200C Digital Sender on the 11th floor.

This message is intended only for the addressee(s), and may contain information that is privileged and confidential. If the recipient of this message is not an addressee, please notify us immediately by telephone at 617-443-9292.